

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, and Swanson
From: Luisa Menchaca, General Counsel
Carla Wardlow, Chief, Technical Assistance Division
Subject: Project Proposals – Conflict of Interest Codes and Statements of
Economic Interests
Date: June 28, 2002

I. INTRODUCTION

The Political Reform Act (the “Act”)¹ requires many public officials to disclose personal financial holdings that may be affected by their official duties. It does so through two vehicles: adoption of agency conflict of interest codes and mandatory filing of individual Statements of Economic Interests (SEIs).

To implement the Commission’s goals and objectives for the year 2002, in April 2002, staff identified concrete projects in the conflicts/disclosure area for Commission consideration. The Commission selected five proposals for consideration this calendar year.

Staff is dedicating resources to these proposals which include: Project A.2 (Commission Role – Local Government Agencies), Project A.5 (Conflict of Interest Codes – Placement of Positions/Classification in Appropriate Disclosure Categories), Project A.6 (Model Disclosure Categories), Project A.7 (Commission Role – Section 87200), and Project B.2 (Definition of Investment). Staff has convened a working group comprised of personnel from each division to conduct research and prepare proposals for Commission review in connection with the projects. Staff has combined projects A.2 and A.7 due to overlapping issues applicable to both state and local governmental agencies.

This memorandum provides a status report on each of the projects. No specific action on proposals is requested at this time. However, if the staff approach to a particular project is not consistent with the Commission’s 2002 goals and objectives, staff requests general guidance on the particular project so that the staff can alter its approach to the project.

¹. Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All references are to the Government Code unless otherwise noted.

II. DISCUSSION

Projects A.2 and A.7 - Commission Determinations Regarding an Agency's Conflict of Interest Code

When and how the Commission should make certain determinations regarding an agency's conflict of interest code were questions identified in the March 29, 2002 memo to the Commission ("Project Proposals – Conflict of Interest Codes and Statements of Economic Interests"). These questions highlight a need for policies, prescribed procedures or possibly legislative amendment that will enable the Commission to effectively advise individuals of an agency, or code reviewing bodies, on the content of an agency's conflict of interest code. In particular, a main concern is deciding the appropriate manner in which to render assistance relating to an agency's conclusions in the conflict of interest code. A collateral issue is whether, under current Commission regulations and policies, advice should be issued to an individual when the advice will impact the provisions of an agency's conflict of interest code.

Commission Role – Local Government Agencies (Project A.2)

Pursuant to sections 83113, 87304, and 87312, the Commission advises, issues orders, and provides technical assistance to agencies in the preparation of conflict of interest codes. The Act also requires each agency to submit its conflict of interest code to its code reviewing body for approval. (Section 87303.) In general, county agencies have the board of supervisors as their code reviewing body while city agencies have the city council as their code reviewing body. (Sections 82011(b) and (c).) The Commission shall, upon request, provide technical assistance to agencies in the preparation of conflict of interest codes. (Section 87312.)

Frequently, when a local code reviewing body or an employee of a local agency disagrees with an agency's determination, the Commission is approached for advice on the matter. However, these are determinations that are made by the code reviewing body pursuant to section 87301, which provides that it is the policy of the Act for conflict of interest codes to be formulated at the most decentralized level possible. The remedy for an employee who disagrees with his or her agency's determination is to petition the agency to amend its code. (Section 87307.) Ultimately, a judicial remedy is available. (Section 87308.) This issue does not arise with respect to multi-county and state agencies because the Commission is both the advice giver and the code reviewing body for these entities.

Questions pertaining to the Act's disqualification rules posed by an individual occasionally can also have implications for an agency's conflict of interest code when the questions involve determining whether an individual in a particular position is a "public official" who "makes governmental decisions." These issues, raised either by a code reviewing body or an agency employee, can have an effect on an agency's conflict of interest code. Where a Commission conclusion varies from a local agency's

determination that the individual makes or participates in making governmental decisions, the provisions of the code may be impacted.

Most recently, the Commission has been increasingly asked to advise on situations where an individual under contract with a local governmental agency has been designated as a “consultant,” a type of public official frequently subject to broad disclosure. In addressing the question of whether the individual qualifies as a consultant, regulation 18701 provides the following definition:

“(2) ‘Consultant’ means an individual who, pursuant to a contract with a state or local government agency:

(A) Makes a governmental decision whether to:

1. Approve a rate, rule, or regulation;
2. Adopt or enforce a law;
3. Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;
4. Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;
5. Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;
6. Grant agency approval to a plan, design, report, study, or similar item;
7. Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof;

or

(B) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18702.2 or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Government Code Section 87302.” (Regulation 18701(a)(2).)

Staff has found that if an individual under contract with a local agency disagrees with his/her agency’s conclusion that he/she qualifies as a “consultant” because the agency has concluded that this definition is met, the individual, pursuant to section 83114, will seek assistance directly from the Commission regarding whether the consultant designation is correct. The Commission is generally bound by section 83114 to advise a person with duties under the Act unless a specific exception provided in regulation 18329(b)(8) or (c)(4) applies.

The Commission may also issue any appropriate order directed to an agency or take other appropriate action if any agency fails to submit or amend a conflict of interest code. (Section 87304.) However, due to the “decentralization” policy of section 87301, it is not always clear when it is appropriate for the Commission to make a determination that would impact the formulation or amendment of a local agency’s conflict of interest code. As with other types of conflict of interest code questions, if the Commission declines to give advice because a response would be inappropriate, as is permitted under regulation 18329(b)(8)(F), an individual is normally left with the option of seeking judicial review of his or her agency’s action following an appropriate appeal to the code reviewing body. (Sections 87307 and 87308.) Consequently, where questions arise regarding a local agency’s conflict of interest code, it is not always clear in what manner advice should be issued.

As such, this project entails clarifying when individuals who work for local agencies, or code reviewing bodies, may seek advice and/or assistance or appeal a determination by the agency concerning the disclosure and disqualification provisions of the Act. Addressing this issue through the advice letter process, it may be helpful to require amendment of regulation 18329² to address whether such questions should be answered as requests for formal or informal written advice. Additionally, by providing a procedural mechanism to allow the appeal by public officials of local governmental agencies on a conflict of interest code decision to the Commission, the Commission may wish to seek amendment of section 87307 to allow the Commission limited appellate authority with regard to these issues. Staff anticipates that more concrete proposals can be presented to the Commission at the October or November 2002 Commission meeting.

Commission Role – Section 87200 (Project A.7)

Officials listed in section 87200 are subject to extensive disclosure requirements under the Act. When section 87200 was amended to add “other public officials managing public investments,” the Commission considered what types of public officials would qualify under this new category; these public officials would no longer be required to file statements under their agencies’ codes. These standards are now codified in regulation 18701(b).

As agencies were amending their codes to remove these officials, questions were raised whether the code amendments would cause confusion for filers, filing officers, and the public. Would the filers and the public understand that removal from the code did not mean that officials were being excused from disclosure and disqualification? Would filing officers remember to obtain statements from filers no longer covered by the code? To lessen the confusion, staff recommended that agencies identify these officials somewhere in the code as “87200 filers.” To offer additional guidance, Commission staff has recently recommended to the Executive Director that in reviewing state agency and multi-agency codes, clarifying language similar to that shown below should be included in the appendix of their codes:

² Regulation 18329 describes the types of requests that the Commission is authorized to decline.

“The following positions are NOT covered by the code because they must file under section 87200 and, therefore, are listed for informational purposes only:

[positions listed]

An individual holding one of the above listed positions may contact the Fair Political Practices Commission for assistance or written advice regarding his or her filing obligations if the individual believes that his or her position has been categorized incorrectly. The Fair Political Practices Commission makes the final³ determination whether a position is covered by section 87200.”

This language has been developed to clarify that the listing of section 87200 filers is meant to be an informational item rather than part of the agency’s code provisions. Additionally, this language notifies individuals that they may contact the Commission regarding their status as section 87200 filers. Staff believes this language may be helpful to filers in understanding the distinction between being a “code” filer and a “statutory” filer. This is because the Commission may not make the initial determination whether an agency's officials are section 87200 filers when the agency has an existing code. This determination is often first made by the agency and then reviewed by the Commission.

This project would entail examining what procedural mechanisms can be implemented when code reviewing bodies or individuals in an agency seek clarification or a determination regarding when a particular type of public official is one who manages public investments. The staff has not yet formulated concrete proposals regarding these issues but it is anticipated that recommendations can be made for the October 2002 meeting.

Project A.5. Conflict of Interest Codes – Placement of Positions/Classification in Appropriate Disclosure Categories

Public officials who make or participate in the making of governmental decisions are required to file SEIs. Pursuant to section 82019, a position must be designated for inclusion in an agency’s conflict of interest code when “the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest.” Regulation 18730, subdivision (b)(2) provides that for those persons declared to be designated employees in a conflict of interest code, “[i]t has been determined that these persons make or participate in the making of decisions which may foreseeably have a material effect on financial interests.” The legal departments of most agencies make the actual determinations as to which positions should be designated.

³ The Commission staff’s objective is that the agency provide notice to its employees that an official can always seek written advice from the Commission directly, without petitioning his or her agency to amend its conflict of interest code.

Although this process may, at first blush, seem straightforward, there are a number of issues that arise regarding the designation process. Those issues are:

- 1) How an employee should be identified as a designated employee, and thereby required to file a statement of economic interests.
 - a) Should the employee be identified by civil service classification? or,
 - b) Should the employee be identified by his or her working title, job description or some other method?
- 2) How the individual employee's disclosure category would be determined.
- 3) How and when the designated employee should be given notice that he or she is a designated employee and thereby required to file a statement of economic interests.
- 4) How quickly must an agency determine that an employee has an obligation to file a statement of economic interests and then give the employee notice of the filing obligation.

The question then becomes whether the Commission should establish procedures or guidelines for filing officers on how to identify designated employees, notify them of their filing requirement and set forth a timeline for accomplishing both of those tasks. If it is determined that the Commission should establish those procedures or guidelines, then what method would be most effective in providing those procedures or guidelines to state agencies?

In order to address that question, staff needs to determine the following:

- 1) What method state agencies are currently using to identify their designated employees.
- 2) How filing officers are currently notifying designated employees of their requirement to file statements of economic interests.
- 3) In what time frame are the two tasks currently being accomplished by the filing officers.

A survey of the conflict of interest codes for 180 state agencies was conducted to determine what method those agencies are currently using to identify their designated employees. The results of the survey (set forth in Attachment 1) are as follows:

- 1) 16 state agencies use only civil service classifications to identify designated employees.
- 2) 78 state agencies use only working titles / job descriptions to identify designated employees.
- 3) 86 state agencies use a combination of both civil service classifications and working titles / job descriptions to identify designated employees.

During staff discussions on the results of the survey, it was preliminarily determined that it would be impractical for the Commission to try to establish a single method to be used by all state agencies for identifying designated employees. Attempting to arrive at a model identification method that could work equally well for all state agencies would create an enormous burden on the Commission's staff and it is not likely

that many of the affected state agencies would be willing to take on the burden of amending their conflict of interest codes to adopt new methods of identifying their designated employees. Therefore, at this time, staff believes it is appropriate to permit state agencies to continue to adopt and implement their own method of identifying their designated employees. Staff will continue to explore, however, whether it would be useful to encourage state agencies to include civil service classifications where only working titles are currently used.

Staff also suggests that we conduct another survey of the filing officers from various state agencies to determine how those agencies determine a designated employee's disclosure category, notify the designated employee of his or her filing requirements, and in what time frame those notifications are being made. At this point, staff does not believe that it will be necessary to contact all 180 agencies to conduct this survey. However, it is difficult to determine how many agencies must be contacted in order to develop a reliable sampling of what procedures (if any) are being followed by all state agencies. It has been discussed and proposed that the Technical Assistance Division could conduct this survey.

Once staff has gathered sufficient data, staff will be able to provide recommendations to the Commission as to whether the Commission should establish guidelines and procedures for filing officers, and propose options for accomplishing those tasks. Staff believes that this project can be accomplished, and recommendations presented to the Commission by October 2002.

Model Disclosure Categories (Project A.6)

Most state and local agencies have adopted the Commission's model conflict of interest code. (Regulation 18730.) During the course of the Filing Officer Outreach Program, staff has conducted an informal review of local agency codes. Many of them require overly broad disclosure for designated employees, or do not provide for disclosure by consultants. The Commission authorized the staff to explore whether the Commission should develop model disclosure categories to assist agencies in crafting their codes.

As a starting point, staff has begun looking at conflict of interest codes for state agencies. Although the goal of the project is to develop model disclosure categories for local agencies, because the Commission is the code reviewing body for state agencies, we have immediate access to state codes and staff believes model disclosure categories can be developed for them before the end of this year. In addition, in early 2003, state agencies must perform a biennial review and amend their codes pursuant to section 87306. Having the model disclosure categories in place during this process will be timely. Staff also believes that developing categories for state agencies will assist us in analyzing the feasibility of undertaking such a project at the local level.

Preliminarily, it is staff's opinion that the Commission will not be able to develop "one size fits all" disclosure categories applicable to all agencies. Instead, we will need to categorize agencies according to their function and develop categories tailored to the

types of positions utilized by the agencies. At the state level, there are six general categories of agencies: grant and service providers; law enforcement; infrastructure (CalTrans, State Personnel Board, colleges and universities); regulatory, permit and licensing; financing authority; and advisory to the Governor or the Legislature. At the local level, there are cities, counties, school districts, water districts, hospital districts, joint powers authorities, community colleges, and a host of other units of government. The courts also are required to have conflict of interest codes. After further study, staff may recommend that the local agency project be narrowed. In any event, the project may be ongoing for a year or longer.

Staff has requested and is reviewing the conflict of interest codes for San Francisco, Los Angeles, and Oakland. In addition, the Technical Assistance Division is conducting workshops during June for local agencies on the procedures for amending conflict of interest codes and is soliciting input from the attendees whether they would find model disclosure categories useful. To date, the response has been positive, but the agencies expressed the desire for flexibility and that they not be forced to use only the Commission's model disclosure categories.

Definition of Investment (Project B.2)

Public officials are required to disclose investments they hold in business entities that do business in their jurisdictions and these investments can trigger disqualification under the Act's conflict-of-interest provisions. (Section 87100 et seq.) The definition of "investment" in section 82034 contains various exceptions, including diversified mutual funds registered with the Securities and Exchange Commission, trust funds, and government bonds. In the past few years, many new investment vehicles have been created that are similar to mutual funds but are not "diversified mutual fund[s] registered with the Securities and Exchange Commission." Despite the fact that the official has no control over how and where these funds are invested, they are reportable and may be disqualifying. The Commission authorized the staff to determine whether the Commission should sponsor legislation to amend section 82034 to address these concerns.

Staff has begun researching various investment options available to public officials, but will not be able to devote substantial resources to the project until the advertising and member communications regulations have been finalized.

Attachment: Attachment 1